

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**TYSON FOODS, INC., et al.,**

**Defendants.**

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**Case No. 4:05-CV-329-GKF-PJC**

**STATE OF OKLAHOMA’S RESPONSE TO DEFENDANTS’ SUPPLEMENTAL  
SUBMISSION REGARDING APPLICATION OF RULE 408 TO PUBLIC DOCUMENTS  
[NEWSPAPER ADVERTISEMENTS] [DKT. #2660]**

Plaintiff, the State of Oklahoma (“the State”), hereby submits its response to Defendants’ Supplemental Submission Regarding Application of Rule 408 to Public Documents [DKT #2660]. Defendants’ objection to the admission of State’s Exhibits 0335 and 0336 on Fed. R. Evid. 408 grounds should be overruled.

**I. BACKGROUND**

Nine months before the State commenced this action, Defendants embarked on a public relations campaign to persuade Oklahomans that Defendants were doing their part “to improve the management of poultry-related nutrients that might find their way into Eastern Oklahoma’s Scenic River Watersheds.”<sup>1</sup> (State’s Ex. 335, *The Oklahoman*, Sept. 10, 2004, at 13A (attached as Exhibit A).) Defendants purchased advertisements in *The Oklahoman* and the *Tulsa World* (State’s Ex. 336, *Tulsa World*, Dec. 5, 2004, at A29 (attached as Exhibit B). Among other things, Defendants acknowledged that excess nutrients on the land and in the waters of Eastern

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<sup>1</sup> Although a party to Defendants’ Supplemental Submission, Defendant Cal-Maine did not participate in that campaign. Dkt. #2432 at 1 n.1. For ease of reference, however, the State refers to “Defendants” without exception.

Oklahoma can come from the land application of poultry litter, and they described their efforts to manage nutrients. (*E.g., id.*)

Moreover, Defendants have previously conceded that “[t]hese ads were run *after* the failed private mediation between [Defendants] and [the State].” DKT #2432 at 2 (emphasis added). Thus, their current claim that the public “advertisements at issue were made *in the course of* settlement negotiations over this dispute” is simply not true. Dkt. #2660 at 3 (emphasis added).

## II. ARGUMENT

Defendants’ argument that two advertisements in their public relations campaign qualify for Rule 408 protection is without merit.

Federal Rule of Evidence 408 provides:

**Rule 408. Compromise and Offers to Compromise**

**a) Prohibited uses.**--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

**(b) Permitted uses.**--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

As an initial matter, the State must correct a representation Defendants made to the Court on September 30, 2009 when this issue arose at trial. The Court had the following exchange with defense counsel:

THE COURT: *Are there any cases by which a settlement position advertised in a newspaper of general circulation may constitute a privileged settlement discussion that may not be admitted into the trial of an issue as a statement against – or an admission against interest?*

MR. HOPSON: I'm just going to make a relevance objection rather than wrestle with the hearsay on this one, Your Honor. I just don't know why statements made in this context are relevant to liability in this litigation.

THE COURT: I don't know why it wouldn't be, frankly.

MR. ELROD: *There are cases, but they're in my truck.*

THE COURT: It depends on – with all due respect, a party can't make public statements and then – with regard to a substantive matter and then contend that they're somehow confidential. Mr. Elrod.

MR. ELROD: I was just going to say there are cases, but they're in my truck.

(9/30/09 Transcript at 442:15-443:6 (emphasis added).)

There are no such cases.<sup>2</sup> Defendants' Supplemental Submission filed the day after this exchange cites no such cases. Indeed, neither Defendants' original Motion *in Limine* nor Defendants' October 1, 2009 Supplemental Submission cites any case for the proposition that Rule 408 warrants exclusion of a newspaper *advertisement* taken out by a party.

There is simply no basis to exclude them here on Rule 408 grounds. First, the newspaper ads do not constitute offers of compromise or statements made in compromise negotiations so as to satisfy the language of Rule 408(a). For example, State's Exhibit 335 – the advertisement circulated in *The Oklahoman* – contains the following statements:

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<sup>2</sup> The State has looked extensively and found no such cases, and Defendants have not cited any to the Court.

- “Dear Citizens of Oklahoma,  
  
“We are the thousands of Oklahomans and Arkansans who work in the poultry industry . . . We are farmers and scientists, line workers and professionals, people just like you who care about the quality of our land, lakes and streams.  
  
“That’s why we have been working with the State of Oklahoma on a multi-million-dollar voluntary proposal *to improve the management of poultry-related nutrients that might find their way into Eastern Oklahoma’s Scenic River Watersheds.*” (Ex. A (emphasis added).)
- “Along with measures we’ve already implemented, these steps will help us and contract growers best manage all poultry litter in order to protect these Scenic River Watersheds.” (Ex. A.)
- “Our Scenic River Watersheds are complex environments that include many sources of nutrients that potentially impact the health of the rivers and streams that lie within them. *We are prepared to do our part to take care of the poultry portion of the nutrient equation.*” (Ex. A (emphasis added).)

Such statements are not statements made in the course of settlement negotiations, but are statements made by Defendants to the “Dear Citizens of Oklahoma.” Rule 408 does not extend to such party admissions made directly to the public.

Further, State’s Exhibit 336 – the advertisement circulated in the *Tulsa World* – contains the following statements:

- “Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. So where do these nutrients come from? *Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer.*” (Ex. B (emphasis added).)
- “[A] truly comprehensive plan of nutrient management must go beyond one industry *and encompass all who contribute to nutrient buildup in our watersheds.*” (Ex. B (emphasis added).)
- “We are making a major effort in our industry to manage nutrients.” (Ex. B.)

Indeed, in the *Tulsa World* advertisement, the *only* mention of any dispute whatsoever is the following statement: “We have recently proposed an extensive plan to address poultry-related nutrient management here in our Scenic River Watersheds. With the state’s endorsement, we

hope to move forward with this plan.” (Ex. B.) Such excerpt hardly renders the entire newspaper advertisement an offer of compromise between disputing parties to invoke the protection of Rule 408.

Such representations do not constitute offers of compromise even under the broadest of constructions, and they do not constitute statements in the course of compromise negotiations, as the statements were not made within a negotiating relationship between disputing parties, but were instead statements made by Defendants to the citizens of Oklahoma. Moreover, such statements could not have been made in the course of compromise negotiations, as negotiations between the State and Defendants had ended unsuccessfully, and Defendants admit this. Dkt. #2432 at 2 (“These ads were run *after the failed private mediation* between the companies and the Attorney General.” (emphasis added)).

Second, even if the Court finds that the ads do satisfy Rule 408(a), the exception set forth in Rule 408(b) applies. Again, Rule 408(b) provides in relevant part: “This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.” Fed. R. Evid. 408(b). *See also Orr v. City of Albuquerque*, 531 F.3d 1210, 1219 (10th Cir. 2008). At a minimum, and by way of example only, the ads contain party admissions – including those in bulleted format above – that are relevant to the issue of whether Defendants’ poultry waste contributes to the nutrient problem in the Illinois River Watershed. Indeed, it is not surprising that Defendants so vigorously seek the exclusion of these advertisements because in them, they admit, among other things, that “[n]utrients [in Oklahoma’s watersheds] can come from many sources, one of which is the use of poultry litter as an organic fertilizer.” (Ex. B.) The ads also

may be considered by the Court in its determination as to what injunctive relief may be appropriate. In this connection, in the newspaper ads, Defendants acknowledge the feasibility of, for example, hauling poultry litter out of the watershed and “[i]mplementing other alternatives for litter management such as turning it into fuel, composting it for export, and processing it into organic fertilizer.” In short, the ads would nonetheless be admissible under Rule 408(b) even if they were deemed settlement communications under Rule 408(a).

Defendants principally rely on the decision in *Alpex Computer Corp. v. Nintendo Co., Ltd.*, 770 F. Supp. 161 (S.D.N.Y. 1991), in which the court excluded evidence of a settlement between the plaintiff and a third party, including news articles about the settlement. *Id.* at 162. *Alpex* is readily distinguishable because the evidence at issue there were *news articles* published by the press, and *not advertisements* taken out by Defendants themselves, which readily constitute party admissions under Fed. R. Evid. 801(d)(2).

The other case cited by Defendants in their Supplemental Submission also does not lend them any support. The evidence at issue in *Abundis v. United States*, 15 Cl. Ct. 619, 621 (Cl. Ct. 1988), was a stipulation of settlement dismissal filed in a separate case. *Id.* at 620. As such, the stipulation of settlement fell within the stated language of Rule 408(a), and the proffering party could not satisfy the exception set forth in Rule 408(b). In contrast, here, Defendants’ advertisements do not qualify as offers to compromise or statements made in the course of settlement negotiations so as to receive Rule 408(a) protection. And, even if the Court were to conclude otherwise, the exception set forth in Rule 408(b) is satisfied, as explained above.

Finally, it would defy logic and violate principles of fairness to sustain on Rule 408 grounds Defendants’ objections to the admission of the newspaper advertisements, when they did not restrain themselves on such grounds from circulating such advertisements to the general

public in the first place. That is, if Rule 408 did not prevent Defendants from running those ads in the first instance (and obviously it did not as a matter of fact), it would defy logic that Rule 408 should prevent the State from admitting into evidence those same ads.

WHEREFORE, the State respectfully submits that Defendants' objections to the admission of State's Exhibits 335 and 336 should be overruled.

Respectfully Submitted,

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I hereby certify that on this 3<sup>rd</sup> day of October, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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